

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.436 OF 2005

1. Vimal Kumar J. Choudhary
2. Kanta Devi Choudhary.

...Petitioners

vs.

1. Shree Harivansha Securities & others. ...Respondents.

Mr.Virag Tulzapurkar with S.U.Kamdar i/b. G.B.Kedia, for Petitioner.

Mr.Rajeev Kumar with Ms.Sheetal Kumar i/b. M.M.Patel & Co. for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 13th November,2006..

P.C.:-

1. By this petition, the petitioners challenge the Award dated 11.9.2004 by which the Arbitral Tribunal has directed the respondent no.2 and the petitioners to pay an amount of Rs.3,56,30,160/- (Rupees Three crores Fifty Six lacs Thirty thousand One hundred Sixty only) with interest to the respondent no.1. The arbitration reference had been filed by the respondent no.1 Shree Harivansha Securities Pvt.Ltd. before the Arbitral Tribunal under the bye-laws of Bombay Stock

Exchange claiming the sum recoverable on account of transactions on the stock exchange by them with the respondent no.2 Nikko Stock Broker Pvt.Ltd. According to the statement of case of the respondent no.1, the respondent no.2 is a company incorporated under the Companies Act and the present petitioner no.1 & 2 are Directors of that Company. It was claimed that the respondent no.2 company is really a partnership run solely by petitioner nos.1 and 2 and two others. According to the respondent no.1, the respondent no.1 entered into the transactions with petitioner no.1 some time in the year 1997-98. According to the respondent no.1 for the period from 1.3.2001 till 31.3.2001, the respondent no.1 entered into the transactions with the respondent no.2 Nikko Stock Broker Pvt.Ltd. and in relation to those transactions the amount is recoverable by the respondent no.1 from respondent no.2 company as also from the petitioners. It appears that the respondent no.2 Nikko Stock Broker Pvt. Ltd. did not appear before the Arbitral Tribunal and did not contest the claim. The present petitioners appeared and had basically challenged the jurisdiction of the Arbitral Tribunal to make any award against them. It appears that thereafter the respondent no.1 amended the petition and had claimed that the present petitioners had given oral guarantee for payment of the bill of the respondent no.1. The Arbitral Tribunal thereafter made the Award directing the respondent no.2 and the present petitioners to pay the aforesaid amount to the

respondent no.1. It is that Award which is challenged in this petition.

2. The principal challenge to the Award is that the Arbitral Tribunal of Bombay Stock Exchange had no jurisdiction to make any award against the present petitioners. It is submitted that the jurisdiction of the Arbitral Tribunal of the Bombay Stock Exchange is controlled by the bye-law 248 of the bye-laws of Bombay Stock Exchange and under that bye-law disputes in relation to the transactions which are subject to the bye-laws of the Bombay Stock Exchange which are between a member and a non-member and between members can be referred to arbitration. The present petitioners admittedly are not the members of the Bombay Stock Exchange and therefore, the Arbitral forum has no jurisdiction to entertain any claim against the present petitioners. Perusal of the Award, however, shows that the Arbitral Tribunal has held that though respondent no.2 Nikko Stock Broker Pvt.Ltd. had undertaken transaction on the Bombay Stock Exchange it is really controlled by the present petitioners and therefore applying the doctrine of lifting of corporate veil the Arbitral Tribunal has found that the transaction was really entered into between the respondent no.1 and the present petitioners in the name of respondent no.2. Therefore, according to the Arbitral Tribunal it has jurisdiction to make the Award against the petitioners. The Arbitral Tribunal has also found that the present

petitioners have given oral guarantee for repayment of the amount and therefore, for that reason also the Arbitral Tribunal has jurisdiction to make the Award.

3. The learned Counsel appearing for petitioners submits that the Arbitral Tribunal was acting under the provisions of bye-law 248 of the Bombay Stock Exchange. Under the bye-law 248 of the Bombay Stock Exchange disputes in relation to the transactions which are subject to the bye laws of Bombay Stock Exchange between a member and a non member and between members of stock exchange can be entertained by the Arbitral forum. The present petitioners are not the members of the Bombay Stock Exchange and therefore, as the transactions claimed by the respondent no.1 between petitioners and respondent no.1 which was not the transactions between the members and non members and therefore, the Arbitral Tribunal has no jurisdiction. According to the petitioners the transactions subject to the rules of the Bombay Stock Exchange in relation to which the proceedings were filed was between the respondent no.2 Nikko Stock Broker Pvt. Ltd. and Respondent no.1 Shree Harivansha Securities Pvt.Ltd.. and the Arbitral Tribunal has jurisdiction to make Award only against the parties. The term “party” is defined by Section 2 of the Arbitration & Conciliation Act to mean a party to an arbitration agreement, and the petitioners were not party to the arbitration

agreement, therefore, the Arbitral Tribunal has no jurisdiction to entertain the proceedings against the petitioners.

4. The learned Counsel appearing for respondent no.1 on the other hand relying on the provisions of the bye-law 248(a) and (b) and the judgment of the learned Single Judge of this Court in the case “Prashant Commercial Vs. Rajratan R. Mohta, 2006(4) Bom.C.R. 874” submits that any disputes between two non members can be entertained by the Arbitral Forum of the Bombay Stock Exchange. According to the learned Counsel, the Arbitral Tribunal has found that the respondent no.2 company was totally controlled by the present petitioners and therefore, there was duty cast on them, and therefore, the Arbitral Tribunal relying on sub-rule (1) of Rule 4 of Bombay Stock Exchange Rules has fastened liability on the present petitioners.

5. Admittedly, the claim was filed by the respondent no.1 under bye-law 248 of BSE. It is bye-law 248 (a) and (b) of BSE which were referred to by the learned Counsel appearing for both the sides. Bye-law 248 (a) and (b) of BSE reads as under:-

“248(a) All claims (whether admitted or not) difference and disputes between a member and a non-member or non-members (the terms “non-

member” and “non-members” shall include a remisier, authorised clerk, a sub-broker who is registered with SEBI as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights, obligations and liabilities of remisiers, authorised clerks, sub-brokers, constituents, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange.

(b) An acceptance whether express or implied of a contract subject to arbitration as provided in sub-clause (a) and with this provision for arbitration incorporated therein shall constitute and shall be deemed to constitute an agreement

between the member and the nonmember or non-members concerned that all claims (whether admitted or not), differences and disputes of the nature referred to in sub-clause (a) in respect of all dealings, transactions and contracts of a date prior or subsequent to the date of contract shall be submitted to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange and that in respect thereof any question whether such dealings, transactions and contracts have been entered into or not shall also be submitted to and decided by arbitration as provided in the Rules, Bye-laws and regulations of the Exchange. “

It is clear from bye law 248(a) and (b) that disputes in relation to the transaction in the securities which are subject to the rules, bye-laws and regulations of the Bombay Stock Exchange between the members inter-se, and between a member and a non member are arbitrable. By virtue of the provisions of sub-section (4) of Section (2) of the Arbitration and Conciliation Act, the provisions of bye-law 248(a) are to be treated as the Arbitration Agreement. Thus, in a dispute between

a member and a non member it is that member and the non member who are parties to the arbitration agreement. Therefore, the arbitral tribunal gets jurisdiction to entertain the dispute only between a member who has transacted the business on Stock Exchange and the non member concerned. The Arbitral Tribunal will not get jurisdiction to entertain the dispute between a non member and any other person who is not a member of the Stock Exchange. In order to assume jurisdiction over a dispute between a non member and a person who is not a member of the Stock Exchange, the Arbitral Tribunal will have to record a finding that though that person is not actually a member of Stock exchange but by some logic or for some reason he is deemed to be a member of Bombay Stock Exchange. It is clear that it is not even the case of respondent no.1 that the present petitioners were members of stock exchange or are deemed to be members of the stock exchange. A reference made by the Arbitral Tribunal in its award to a letter written by the respondent no.2 Company to the Stock Exchange where, according to the Arbitral Tribunal, the respondent no.2 has made a false claim, in my opinion, was not relevant for finding out as to who is really liable to pay to the respondent no.1. The jurisdiction of the Arbitral Tribunal under the Arbitration and Conciliation Act is restricted to make Award against parties to the arbitration agreement. Therefore, without recording the finding that the petitioners were parties to the arbitration agreement, the Arbitral Tribunal will not have

the jurisdiction to make the Award against the present petitioners. The submission that the learned Single Judge of this Court in its judgment in the case “Prashant Commercial” referred to above has laid down the law that even transaction between non members are arbitrable under the bye-laws of the Bombay Stock Exchange, in my opinion, is not correct. That was not the question considered by the learned Single Judge. The question that was considered by the learned Single Judge was maintainability of Civil suit. I do not find anything in bye law 248 to say that the dispute between two non members is arbitrable under that bye-law. It was submitted on behalf of respondent no.1 that because bye-law 274A provides for an appeal against the Award which is impugned in the petition passed by the Arbitral Tribunal, the present petition is not maintainable. The submission has no substance. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act. Section 34 of the Act provides for an application for setting aside an Award before the Court. It is clear from the provisions of the Arbitration Act that any adjudication made by the Arbitral forum which is binding between the parties and casts an obligation upon the parties amounts to an Award. It is nobody's case that the Award which is impugned in this petition is not an Award within the meaning of the Act. If the award which is impugned in the petition is an Award under the Act, then section 34 of the Act provides remedy against that Award. Merely because the bye-law provides an appeal, it. will not cut down

the operation of section 34 of the Act and will not make the petition challenging the Award not maintainable under Section 34 of the Act because appeal is not filed before the Arbitral Tribunal under the bye-laws. I do not find any substance in the submission made on behalf of the respondent no.1. To my mind it is clear that so far as the present petitioners are concerned, the Arbitral Tribunal had no jurisdiction to make the Award and therefore, the Award impugned in this petition in so far as it directs the present petitioners to pay to the respondent no.1 is invalid and is liable to be set aside.

6. Accordingly, therefore, the Award at Exhibit A in so far as it directs the petitioners to make payment of amount mentioned in the operative part of the Award to the respondent no.1, is set aside. The respondent no.1 is directed to pay costs of this petition to the petitioners as incurred by the petitioners.
